RE SARJIT SINGH KHAIRA

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J
[ORIGINATING MOTION NO. KG. 26 OF 1990]
7 JULY 1995

ADMINISTRATIVE LAW: *Dismissal - Applicant senior accounting officer - State Secretary issuing order of transfer to another department - Non-compliance - Disciplinary inquiry by Public Services Commission - Whether State Secretary had power to transfer a public officer from one government department to another - Government of Sarawak General Orders, O. 40(1)(a) & Constitution of Sarawak, Article 36(1) & (6) - Whether action taken by Public Services Commission ultra vires - Public Services Commission Rules 1964, r. 26(1)(b).*

PRACTICE & PROCEDURE: *Order 53 RHC - Certiorari - Discretionary remedy - Whether order of Court declaring transfer order invalid a prerequisite to an application for certiorari - Certiorari having indirect effect of reinstating applicant - Applicant pursuing damages in pending actions - Whether grounds to refuse order for certiorari.*

On 10 April 1975, the applicant was appointed senior accounting officer under the category of executive and sub-professional group in Jabatan Kerja Raya (JKR) at Simanggang, Sarawak. He served there and in Kuching until he was ordered by the State Secretary to proceed on transfer to the Treasury Department in Limbang. He appealed to the State Secretary against the transfer order but was unsuccessful. The applicant remained in JKR, Kuching and made a second appeal for reconsideration but received no reply. Meanwhile, upon the applicant's failure to comply with the transfer order, the State Secretary tendered a report to the Public Services Commission (PSC) which instituted disciplinary proceedings and appointed a Committee to inquire into the matter pursuant to r. 26(2) of the PSC Rules 1964 (the Rules). It was the PSC's finding that the applicant had refused to obey the lawful order of the Government and he was dismissed for misconduct pursuant to O. 69 of the Sarawak General Orders (the General Orders). The applicant applied for an order of *certiorari* to quash the order of the PSC on the basis *inter alia* that the PSC's action against him was without jurisdiction.

The respondent submitted *inter alia* that the PSC was entitled to presume the transfer order valid unless the applicant had the order pronounced by a Court to be unlawful. It further argued that as the applicant had two pending suits for damages, he should be left to pursue that remedy instead of granting him *certiorari* as it would have the same effect of a reinstatement.

The main issue was whether the State Secretary had the power to transfer the applicant to another department.

Held:

[1] Order 40(1)(a) of the General Orders grants the State Secretary the power to transfer public officers from one department to another but it is confined to administrative officers, officers of the Sarawak administrative service and officers of the general clerical service which excludes the applicant as he belongs to the executive and sub-professional group.

[2] For the State Secretary to validly exercise the power of transfer, powers must be delegated by the PSC under Article 36(6) of the Constitution of Sarawak as by Article 36(1) the original power to transfer vests with the PSC personally. Without express delegation,

the State Secretary on his own has no such power of transfer irrespective of whether the PSC subsequently agrees with the decision of the State Secretary as the PSC cannot ratify the unlawful act of the State Secretary by such agreement.

[3] Though the Instrument of Delegation dated 28 November 1989 was produced to show there was delegation of power to the State Secretary, the restrospective effect of the Instrument to a date before the purported order cannot validate the order which is otherwise unlawful for to do so would adversely effect the substantive right of the applicant as at the date of the order only the PSC could order such a transfer. No delegation was as yet given to the State Secretary to do so.

[4] The power to exercise disciplinary control over members of the public service is clearly with the PSC pursuant to Article 36(1) of the Constitution. The burden is on the PSC to satisfy itself that the order is lawful before embarking with proceedings to dismiss the applicant. If the said order is unlawful, then clearly the PSC is acting outside its jurisdiction and failure to comply with such unlawful order would not attract the provisions of O. 69 of the General Orders upon which the charge was based.

[5] If proper inquiry as required by r. 26(1)(b) of the Rules shows that the applicant had committed a misconduct then the PSC is within jurisdiciton to frame a charge and require the applicant to exculpate himself of the charge. But here the PSC was merely prepared to go along with the State Secretary in agreeing with the order even though it was issued contrary to the Constitution. In such a case the applicant should not be prevented from bringing this action to quash the order of the PSC simply on the ground that he had not first taken the matter of the validity of the transfer order to be adjudicated by the Court.

[6] The two suits filed by the applicant are not relevant to the application for *certionari*. In proceedings under O. 53 of the Rules of the High Court 1980 unlike O. 53 of the English Rules of the Supreme Court, this Court can only grant *certiorari* and not consequential reliefs such as damages or declaration. It is therefore open to the applicant to pursue other consequential remedies in other actions.

[Application granted with costs].

Cases referred to:

Sarjit Singh Khaira v. The Government of the State of Sarawak & Anor. [1990] 2 MLJ 251 ***(refd)***
Doe d. Rochester (BP) v. Bridge ***(foll)***
O'Reilly & Ors. v. Mackman & Ors. [1983] 2 AC 237 ***(refd)***
Aria Kumar @ Omar bin Abdullah & Anor. v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor. [1994] 3 AMR 49 ***(refd)***
Pengarah Pelajaran, Wilayah Persekutuan & Ors. v. Loot Ting Yee [1982] 1 MLJ 68 ***(dist)***
Hoffman-La Roche v. Secretary of State for Trade and Industry [1974] 2 All ER 1128 ***(cit)***
Ferguson v. Kinnoull (Earl of) [1842] 9 Cl & F 251 ***(refd)***
Francis v. Municipal Councilors of Kuala Lumpur [1962] 28 MLJ 407 ***(dist)***
Chief Constable of North Wales v. Evans [1982] 3 All ER 141 ***(dist)***

Legislation referred to:

Constitution of the State of Sarawak, Articles 36(1), (3), (6), 37(3)
Federal Constitution, Articles 144(1), (7)
Government of Sarawak General Orders, O. 4, O. 39, O. 40(1)(a), O. 69
Public Services Commission Rules 1964, rr. 2, 7, 15, 26(1)(b), 26(2)
Rules of the High Court, O. 53
Rules of the Supreme Court (UK), O. 53,

For the applicant - T.O. Thomas, M/s. T.O. Thomas & Co.
For the respondent - J.C. Fong (Lim Heng Joo with him); State Attorney General, Sarawak
Frank Tang (Paul Tang with him) Public Services Commission

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:

This is an application by the applicant for an order of *certiorari* to quash the decision made by the Sarawak Public Services Commission ("the PSC") on 14 December 1988 whereby he was ordered to be dismissed from the State service as an accounting officer with effect from 1 January 1989. The said order of the PSC flows from the report of the committee appointed by the PSC purportedly pursuant to r. 26(2) of the Public Services Commission Rules 1964 ("the Rules") to inquire into the disciplinary conduct of the applicant. The disciplinary conduct of the applicant came into question when the PSC received a report from the State Secretary of Sarawak ("the State Secretary") that the applicant had refused to comply with the lawful orders of the Government requiring him to proceed on transfer from Jabatan Kerja Raya, Kuching ("JKR") where he was then serving to the Treasury Department, Limbang contrary to the provisions of O. 69 of the Government of Sarawak General Orders ("the General Orders").

Prior to April 1975, the applicant was an officer of the Government of Sarawak serving in the Audit Department. In response to a Public Services Commission notice exhibited as "A" to the affidavit in reply of the applicant affirmed on 6 July 1991 (encl. 49 in O.M. KG. 26 of 1990), the applicant applied for the post of a senior accounting officer, which post was then vacant, in the JKR Simanggang, Sarawak. The post was classified in the notice to be in the executive and sub-professional group. The said notice invited for applications from Malaysian citizens, domiciled in Sarawak and from serving Government officers. It is clear from the said notice that the post was meant to fill the vacancy in the JKR. The applicant attended the interview for the said post. After the interview by the PSC, on 10 April 1975 he was offered the post as "an appointment by transfer" to fill the post in the JKR, Simanggang, Sarawak. Exhibit "A-l" to the said affidavit in reply of the applicant is the offer letter. The offer came from the office the Chief Minister signed on behalf of the State Secretary. According to exhibit "A-l" the appointment is on permanent and pensionable terms. He was required to serve a probationary period of one year with effect from the date of his appointment which would be from the date of his assumption of duties in the new post. Exhibit "A-l" also stipulates that in the event of his failure to secure confirmation of his appointment, action would be taken to terminate his probationary appointment. He accepted the offer and served the JKR both in Simanggang and Kuching ever since until he was directed by the State Secretary through the Director of JKR to be transferred to the Treasury Department in Limbang also as a senior accounting officer by a letter dated 28 April 1987 (exhibit "A" to the applicant's affidavit affirmed on 3 September 1990 mentioned earlier), in exchange with another officer from the said Treasury Department. It is this order that the applicant is alleged to have refused to comply which culminates in the order of the PSC dismissing him from the government service.

He was instructed to proceed on transfer within 2 weeks from the date of the letter which expired on 12 May 1987. However, by a letter dated 29 April 1987, the applicant appealed to the State Secretary against the decision to transfer on him. The appeal letter is exhibited as "B" to the affidavit of Tan Sri Datuk Amar Bujang, for and on behalf of the Government affirmed on 23 January 1991 in encl. 15 in O.M. KG. 26 of 1990. Various grounds were put in for the reconsideration of the Government against the transfer. The first ground concerned his health condition. It is not in dispute that he had a heart problem and had undergone a

coronary by-pass which requires regular attention. The second involved the understanding had between the Government and the Sarawak Government Officer's Union as contained in the minutes of the meeting of the Consultative Forum held on 18 April 1994, that the Union's president of which the applicant is one, shall not be transferred away from Kuching during his tenure of office. The other grounds concerned the effect of his transfer to Limbang over his other welfare activities in Kuching. However his appeal was turned down by the State Secretary.

On 26 May 1987, which is past the date which the applicant ought to have proceeded on transfer. The applicant submitted another appeal for reconsideration of the Government. It is exhibit "A" to the affidavit of the applicant affirmed on 28 March 1991 in encl. 25 in O.M. KG. 26 of 1990. In this second appeal, he contended that the decision to transfer him is ill-advised, unjust, improper and illegal. *Inter alia* he challenged the validity of the said transfer order as his transfer would involve a transfer of an officer not within a department of Government as the Treasury Department is entirely, a separate and different department from the JKR. He also alleged that the post of a senior accounting officer is not under a common-user scheme. However, he received no reply to this second appeal from the Government. All those while he did not proceed on transfer as ordered but stayed put in JKR, Kuching.

As he failed to comply with the order to proceed on transfer, the State Secretary reported the matter to the PSC with a view to institute disciplinary proceedings against him for having failed to comply with the said order. Following the receipt of the report from the State Secretary the PSC purportedly in compliance with the provisions of r. 26(1)(b) of the Rules issued a letter dated 7 September 1987 to the applicant, containing the charge framed against him and he was given 21 days to submit to it a representation in writing to exculpate himself of the charge. The said letter is exhibit "L" to the affidavit of the applicant affirmed on 3 September 1990 in encl. 4 in O. M. KG. 16 of 1990. By a letter dated 3 October 1987 which is exhibit "B" to the affidavit of Datuk Polycarp Sim Cheng Mong for and on behalf of the Government affirmed on 22 January 1991 in encl. 16 in O.M. KG. 26 of 1990, the applicant replied to the letter of the PSC dated 7 September 1987 denying the allegation and gave his explanation, *inter alia*, that the transfer order of the State Secretary and its enforcement is unjust, irregular, improper, arbitrary and/or illegal. He reiterates that the post of senior acounting officer he was appointed to is not under common-user scheme, and therefore, any transfer ought not to be done without his consent.

He alleged that the order of transfer in the circumstances, is an act of victimisation for the reason of his union activities and on account of his health conditions. He also informed the PSC that the action of the State Secretary to forward his matter to the PSC is premature as his second appeal to the State Secretary of 26 May 1987 remained unanswered.

Having considered his representation, and since the statement of the applicant did not contain a clear admission of the charge preferred, the PSC purportedly in pursuant of r. 26(2) of the Rules, appointed a committee to inquire into the matter which was done. The notes of proceedings before the committee is exhibited as "C" to the affidavit of Datuk Polycarp Sim Cheng Mong affirmed on 22 January 1991 for and on behalf of the Government. Having completed the inquiry the Committee submitted its report to the PSC. It is after the consideration of the report and the result of the investigation by the Committee that the PSC decided unanimously on 14 December 1988 that the applicant refused to obey the lawful order of the Government, which is the transfer order issued on the direction of the State Secretary, and that the applicant's misconduct was serious enough to warrant his dismissal from the civil service pursuant to O. 69 of the General Orders and ordered for his dismissal effective from 1 January 1989. By a letter dated 22 December 1988, which is exhibit "Q" to

the affidavit of the applicant affirmed on 3 September 1990, (encl. 4 in O.M. KG. 16 of 1990), the PSC informed the applicant of the decision to so dismiss him from the public service. It is against that order of the PSC that the applicant by this application now seeks the Court to quash. According to the said affidavit of Datuk Polycarp Sim Cheng Mong at all material times, from the receipt of the report of the State Secretary until the time when the PSC made its decision on 14 December 1988, the members of the PSC were not aware of any order from any competent Court declaring the said transfer order void, or unlawful, or invalid. As such the PSC regarded the said order as being a valid order.

It is the contention of Mr. Thomas, the learned Counsel for the applicant, *inter alia*, that both the PSC and the Committee so appointed by it to inquire into the matter of the charge framed against the applicant, proceeded against the applicant without jurisdiction. This is so because the applicant was not liable to be transferred out of the JKR to another department such as the Treasury Department, in this case, he not being in common-user service. What these terms "common-user service" means is not clearly explained in the evidence except that reference was made to the decision of the Tribunal Perkhidmatan Awam Rujukan No. 57 Tahun 1980 relating to anomaly in the salary structure of the members of the public service on account of the implementation of the Cabinet Committee Report. In the the said decision of the Tribunal at paragraph 32 it is stated that the scheme for senior accounting officer is not a common-user scheme. Referring to the said judgment of the Tribunal, Haidar J in *Sarjit Singh Khaira v. The Government of the State of Sarawak & Anor*. [1990] 2 MLJ 251 has this to say at page 253:

> Whilst it is true that the Public Service Tribunal judgment is confined only to the issue of an anomaly within the meaning of s. 2 of the Public Service Tribunal Act 1977 and the issue of transferability is not an anomaly. I do not see why I should not accept the opinion expressed therein that the senior accounting officer's scheme (to which the plaintiff belongs) is not a common-user.

Whatever meaning to be given to those terms, in my view, it is not an issue of much importance. The central issue really is whether the State Secretary has any power at all on his own, to transfer a public officer of the State from one department of Government to another as intended in this case. Order 40(1)(a) of the General Orders appears to have given him that power but it merely confines to administrative officers, officers of the Sarawak administrative service and officer of the general clerical service and that power is to be exercised subject to the provisions of the Public Services Commission Rules. From the evidence, the applicant does not belong to any one of those categories of officers. He belongs to the executive and sub-professional group. Rule 2 of The Public Services Commission Rules 1964 ("the Rules") defines "transfer" to mean *inter alia*, the conferment upon a person in the public service of the State of a public office in any department other than that in which he last held substantive appointment. In other words, the movement of an officer from one department of the Government to another department of Government. Rule 7 thereof deals with the procedure, *inter alia*, for the transfer of officers. Nothing in r. 7 which would suggest that the State Secretary can personally exercise his power to transfer an officer in the category of the applicant outside his department, i.e. from the JKR to another department. The only way then for the State Secretary to lawfully transfer the applicant in the present circumstances is by way of a written direction by the PSC delegating such power to him as required by Article 36(6) of the Constitution of the State of Sarawak ("the Constitution") as the original power to transfer officers from one department of Government to another, vests with the PSC personally pursuant to article 36(l) of the Constitution. Article 36(l) of the Constitution, subject to the provisions of the Federal Constitution and of the Constitution itself, places the duty to transfer the members of the public service of the State to the PSC. This duty of the PSC,

however, may by clause (6) be, delegated by the PSC to any public officer or to any board of public officers appointed by it by way of directions in writing. Therefore, for the State Secretary to validly exercise the power of transfer of the applicant from one department of the Government, i.e. the JKR to another department, i.e. the Treasury Department, it must be in pursuance to the delegation of powers given by the PSC. Without this express delegation, the State Secretary, on his own has no power to transfer a member of the public service from one department of Government to another. It is irrelevant whether the PSC subsequent to the order for transfer, agrees with the decision so made by the State Secretary personally. The PSC cannot, ratify the unlawful act of the State Secretary by such agreement. As Lord Tenterden, CJ said in 1831 in *Doe d. Rochester (BP) v. Bridge:*

> ...Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

Thus, in relation to the applicant, it is irrelevant to consider the provisions of O. 40(1) of the General Orders when dealing with the issue of the purported transfer order made upon him as his transfer would involve the movement from one department to another which if to be done by the State Secretary must be with the delegated power given to him by the PSC in accordance with Article 36(6) of the Constitution. Without such express delegated power the order of the State Secretary cannot be a lawful order. In this case the applicant was charged by the PSC to have, contravened O. 69 of the General Orders for failure to comply with the lawful orders of the Government which is the purported transfer order issued upon him by the State Secretary. The said O. 69 states:

> 69. An officer who at any time wilfully neglects or refuses or, from illness occasioned by his own misconduct, becomes unable to obey any lawful order of the Government or is guilty of any other misconduct shall be liable to dismissal without notice.

Therefore, for the PSC to be able to resist this application of the applicant for *certiorari*, it must show that the purported order of the State Secretary was done upon the express delegation of power given to him by the PSC. If this is shown then the order of the State Secretary is a lawful one, and therefore, rightly within the jurisdiction or the PSC to institute disciplinary action against the applicant for his refusal to comply with the said order. The power to exercise disciplinary control over members of the public service of the State is clearly with the PSC pursuant to Article 36(l) of the Constitution. However, if the said order is not lawful, then clearly the PSC is acting outside its jurisdiction in so assuming the jurisdiction resulting in the order of dismissal of the applicant. Thus, the jurisdiction of the PSC is dependent on the lawfulness or otherwise of the purported order of transfer of the State Secretary. The order of transfer as in exhibit "A" to the applicant's affidavit affirmed on 3 September 1990 mentioned earlier, is as follows:

PWD/CSF/469 ( )

Jabatan Kerja Raya
Ibu Pejabat
Wisma Saberkas
Jalan Tun Haji Openg
93582 Kuching
Sarawak

28 April 1987

Encik Sarjit Singh Khaira
Through: Ag. Sr. Accountant
P.W.D. Headquarters,
Kuching.

I am directed to convey the decision of the State Secretary, Sarawak that you are to be transferred to Treasury, Limbang in exchange with Encik Richard Leong Hee Cheong.

2. It has also been directed that the transfer should take effect as soon as possible. In view of this you are hereby instructed to proceed on transfer within 2 weeks from the date of this letter.

3. Please arrange with the Personnel Section in respect of your passages and travelling arrangement without any delay.

"Hidup Selalu Berkhidmat"

Sgd ...

(Kho Kwang Hui)
b.p. Pem. Pengarah Kerja Raya
Sarawak.

On the face of it, it would appear that the decision to transfer the applicant in this case is that of the State Secretary and not that of the PSC. But then it is contended for the respondents that the exercise of the power by the State Secretary was in pursuance to the delegated power given to him by the PSC. It is in the affidavit it of Haji Mazlan bin Haji Hamdan, a member of the PSC, affirmed on 5 December 1994. (encl. 96 in O.M. KG. 26 of 1990), that on 28 November 1989 the PSC by an Instrument of Delegation, delegated its power of transfer of officers in the public service to the State Secretary pursuance to Article 36(6) of the Constitution. The said Instrument is exhibited as "C1". This Instrument of Delegation though dated 28 November 1989 was to operate retrospectively from 20 December 1967, a date before the date of the issue of the purported transfer order. Schedule 1 is appended to the exhibit listing out the posts in respect of which the delegation is made. Items 17 and 18 of Schedule 1 are in respect of senior accounting officer of which the applicant is one. If this Instrument of Delegation is valid then, on the date of the order of the State Secretary, it was already in force. This Instrument superseded the earlier instrument No. 1/67 dated 20 December 1967 which is exhibit "B2" to the said affidavit. In "B2" the post of senior accounting officer is not listed. According to the explanation given by the deponent, in relation to the posting and transfer of officers, they are posted and transferred by the State Secretary pursuant to the General Orders and acting on powers delegated to the State Secretary by the PSC. Thus, it would appear that the State Secretary was exercising his powers of transfers not exclusively in pursuance to the delegated powers given by the PSC but also pursuant to his powers in the General Orders. Since the post of senior accounting officer is not in exhibit "B2" it is fair to assume that when he exercised his power to transfer the applicant in April 1987 when Instrument No. 1/67 was in existences he was then exercising his powers pursuant to the General Orders and not in pursuance to the delegated power given to him by the PSC by the Instrument as the transfer of a senior accounting officer is not within the delegated power. As the transfer involves the transfer from one department to another, clearly as stated earlier, the State Secretary has no power under the General Orders to do so on his own. Though the Instrument of Delegation dated 28 November 1989 was produced to show that there was a delegation of power to the State Secretary to transfer a senior accounting officer on behalf of the PSC but the Instrument was dated after the date of the purported order. The retrospective effect of the Instrument, to a date before the purported order cannot validate the order which is otherwise unlawful for, to do so would adversely affect the substantive right of the applicant as at the date of the order only the PSC could order such a transfer. No delegation was yet given to the State Secretary then to do so. Another aspect of the matter concerning these two instruments of delegations is that, by Article 36(6) of the Constitution, the PSC may by directions in writing and subject to such conditions as it thinks

fit, delegate any of its functions which includes the function to transfer members of the public service, to any public officer, which includes the State Secretary. But Article 37(3) of the Constitution requires that the discharge of the PSC's function by delegation must be done with the consent of the Yang di-Pertua Negeri. However looking at both exhibits "B2" and "Cl" there appears to be no such recital that such delegation of power given to the State Secretary was so made with the consent of the Yang di-Pertuan Negeri. Both Articles 36 and 37 of the Constitution require that the provisions contained therein is to be subject to the provisions of the Constitution. That being the case, anything done pursuant to Article 36(6) must be read in the light of the requirement of Article 37(3) thereof. Therefore, if I am wrong in saying that the Instrument of Delegation of 28 November 1989 cannot have retrospective effect, it is still invalid on account, of it being made without the consent of the Yang di-Pertua Negeri as expressly required by Article 37(3). In the circumstances, I am satisfied that, the purported order of the State Secretary was an unlawful order made without the authority of the PSC. Failure to, comply with such unlawful order will not attract O. 69 of the General Orders. Therefore, there is no basis for the PSC to issue the letter to show cause to the applicant as contained in exhibit "L". The order of dismissal of the applicant on the basis of the report of the State Secretary is therefore wrong in law. A lawful transfer order was an essential preliminary ingredient to the said disciplinary action by the PSC. If the order was unlawful, the applicant is not obliged to comply. His refusal, therefore, cannot be wilful. That being the case, the applicant had not breached any disciplinary conduct and therefore, there is no basis for the PSC to act to dismiss the applicant based on the report of the State Secretary that, the applicant had refused to comply with his order of transfer. No doubt as contended by the learned Counsel for the PSC that the jurisdiction of the PSC in disciplinary matters becomes exercisable when a report from the State Secretary was received. But that would not mean that the PSC could proceed to make an order for dismissal because there are various preliminary matters as prescribed by the Rules which the PSC has to consider before coming to the conclusion. Under r. 26(l)(b) the PSC is required to arrange for such preliminary investigation as it may consider necessary, and if it considers that the facts, if, proved, would justify the applicants dismissal, only then, will any charge be framed for the applicant to answer to exculpate himself of the charge as *prima facie*, the applicant had committed a breach of discipline. If however, upon such preliminary investigation, the facts, if proved, would not justify the applicant's dismissal, no charge would be framed and there was nothing for the applicant to answer to exculpate himself. The matter must rest there. To proceed on with the disciplinary proceedings will be clearly *ultra vires* and without jurisdiction. It is no good for the PSC to say that since there is a report from the State Secretary it is not for it to be concerned whether the order of the State Secretary was lawful or not and on that basis alone it could proceed with the progress of the disciplinary proceedings with a view to dismiss the applicant. Also, it is no good for the PSC to say that since the order came from the State Secretary, it is to be presumed as valid and lawful order unless the applicant takes first step of having the order pronounced by a Court of competent jurisdiction to be unlawful. The burden is on the PSC to satisfy itself that the said order is lawful before embarking with the proceedings to dismiss the applicant. By r. 15 of the Rules all acts of misconduct by public officers are required to be reported to the PSC. The report of the State Secretary, in this particular case, must concern the alleged misconduct of the accused so as to clothe the PSC with the power to proceed with the disciplinary proceedings against the applicant. In this case exhibit "L" dated 7 September 1987 was issued to the applicant stating that after considering all information received, the PSC is of the opinion that disciplinary action be taken against the applicant under r. 26(l)(b) of the Rules on the charge that he failed to obey a lawful order of the Government contrary to O. 69 of the General Order. By that it is taken that the PSC was satisfied based on the report and whatever

preliminary investigation it has carried out, that the applicant had *prima facie* committed a misconduct. Indeed it was so stated in the exhibit that after considering all information received, the PSC is of the opinion that the applicant should be liable for disciplinary action for failure to comply with the lawful order of the Government issued by Pemangku Pengarah Kerja Raya, which is the purported order of the State Secretary. What then are those facts which the PSC had considered, if proved, would justify the applicant's dismissal? If properly considered, the facts would reveal to the PSC that the State Secretary had issued a transfer order directing the applicant to go on transfer from one department of the Government to another department of Government. This is a transfer which is a duty of the PSC under Article 36(1) of the Constitution to do itself which was not done in this case. The next question to ask is, was there a delegation or power, given to the State Secretary to do so on its behalf under Article 36(6) of the Constitution? In the light of what has been said earlier concerning the two instruments of delegations i.e. exhibits "C1" and "B2" the PSC ought to have come to the conclusion that in this particular case the order for the transfer of the applicant by the State Secretary was done without the authority from the PSC. Instrument No. 1/67 dated 20 December 1967 which is exhibit "B2" does not cover the applicant. The PSC cannot rely on the Instrument of Delegation dated 28 November 1989 - exhibit "C1" - as it was then non-existent notwithstanding its restrospective effect, about which I have touched earlier. So clearly at that stage PSC ought to have declined the jurisdiction to proceed with the framing of the charge and to require the applicant to exculpate himself. It is urged upon me that the PSC is merely concerned with consideration of facts, and PSC is not competent to decide on legal matters such as whether the transfer order made by the State Secretary in exercise of his delegated powers and pursuant to the General Orders is lawful or otherwise. I am afraid I cannot agree. The PSC ought to know that for any transfer to be lawful it must be done in accordance with Article 36 of the Constitution, otherwise it is unlawful. If unlawful, its failure to comply would not attract the provisions of O. 69 of the General Orders upon which the charge was based. The PSC cannot presume the validity of the transfer order pursuant to O. 39 of the General Orders which states that an officer shall be liable to serve in any part of Sarawak and to discharge the duties of any post in the public service in which the State Secretary may consider it desirable to employ him, provided that such employment does not entail a loss of salary. These General Orders, according to, O. 4 have no force in law. In any event, the Orders cannot supersede the Constitution which by Article 36 dictates the duty of the PSC as regards the transfers of officers. No doubt r. 26(1)(b) of the Rules uses the word "if proved" and therefore, at that stage after the preliminary investigation, the PSC was not concerned whether the facts could be proved or not. But, to frame a charge under the rule the PSC must have been satisfied of the factual ingredients collected during the preliminary investigation to form the basis for the charge of misconduct. It must have the basis to prove and then it is for the applicant to prove otherwise. It is not a case of trying its luck affecting the fundamental right of a subject and putting all the burden on the applicant to disprove simply because there is a report submitted to it by the State Secretary. The PSC may claim that it mistook the law applicable to the facts. For that I quote the dicta of Lord Diplock in *O'Reilly & Ors. v. Mackman & Ors.* [1983] 2 AC 237 at page 278:

> The breakthrough that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it found them, it must have asked itself the wrong question i.e., one into which it was not empowered to inquire so had no jurisdiction to determine. Its purported "determination" not being "determination" within the meaning of the empowering legislation was accordingly a nullity.

and at page 277 his Lordship has this to say:

> The importance of *Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw* is that it re-established, largely as a result of the historical erudition of Lord Goddard CJ displayed in the judgment of the Divisional Court ([1951] 1 KB 711) a matter that had long been forgotten by practitioners and had been overlooked as recently as 1944 in a judgment *Racecourse Betting Control Board v. Secretary for Air* [1944] Ch. 114 given *in incuriam* by a Court of Appeal of which Lord Goddard had himself been a member. What was there rediscovered was that the High Court had power to quash by an order of *certiorari* a decision of any body of persons having legal authority (not derived from contract only) to determine questions affecting the rights of subjects, not only on the ground that it had acted outwith its jurisdiction but also on the ground that it was apparent upon the face of its written determination that it had made a mistake as to the applicable law.

It is next submitted that the right of Government to transfer its officers cannot be questioned even on the ground of *mala fide*. Two case are cited in support. They are *Aria Kumar @ Omar bin Abdullah & Anor. v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor.* [1994] 3 AMR 49, 2572 and *Pengarah Pelajaran, Wilayah Persekutuan & Ors. v. Loot Ting Yee* [1982] 1 MLJ 68. There is no dispute about the ratio in the two cases. If lawfully done a person cannot complain over the order for his transfer. The impugned transfer in *Loot's* case, *supra*, in any event was not in contravention of Article 144(1) of the Federal Constitution as the transfer was not a transfer within, Article 144(7) which is in *pari materia* with Article 36(3) of the Constitution as he was ordered to be transferred within the same department of the Government which is not the case with the applicant here. However, the applicant before me now is challenging the action of the PSC dismissing him on the ground that there was no lawful order which he had failed to comply which formed the basis for his disciplinary action resulting in his dismissal by the PSC. His transfer involves the transfer from one department of the Government to another. If the order of the State Secretary was lawful, which I hold as unlawful for lack of proper authority, then clearly the applicant has no complaint on the issue of the jurisdiction of the PSC instituting disciplinary action against him for his failure to comply with the order to transfer him to the Treasury Department in Limbang.

It is also said that the PSC is entitled to presume the transfer order of the State Secretary to be valid unless the said order was first declared by the Court in a proper proceeding that it is invalid. It is submitted that up to now there has been no final order of any Court of law quashing the decision made by the State Secretary to transfer the applicant. Thus, at the time when the PSC made the decision to dismiss the applicant, the transfer order was not challenged in any Court of law, competent to pronounce upon the legality or lawfulness or otherwise of the transfer order. By this submission I take it that the learned Counsel is saying that the PSC was on proper jurisdiction to institute disciplinary proceedings against the applicant on the ground that the order of the State Secretary was lawful unless and until pronounced otherwise by a Court of competent jurisdiction. Since no pronouncement has been made so far, the applicant cannot question the validity of the order. In support, the case of *Hoffman-La Roche v. Secretary of State for Trade and Industry* [1974] 2 All ER 1128 was cited, particularly to the dicta of Lord Diplock at 1153 thus:

> Under our legal system, however the Courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is *ultra vires* does not arise until its validity is challenged in proceedings *inter partes*, either brought by one party to enforce the law declared by the instrument against another party, or brought by a party whose interests are affected by the law so declared sufficiently directly to give him

> *locus standi* to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the Court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it, are presumed.

Again the point is missed because firstly the order, of the State Secretary is not a statutory instrument made pursuant to an Act of Parliament. Secondly, we are here dealing with the jurisdiction of the PSC to institute disciplinary proceedings against the applicant. The condition precedent to the jurisdiction is to be based on the existence of the basis of the allegation of misconduct on the part of the applicant. If upon proper inquiry or investigation as required by r. 26(l)(b) of the Rules there is a basis to show that the applicant had committed misconduct then the PSC is on a proper jurisdiction to frame a charge and to require the applicant to answer to exculpate himself of the charge. But in this case, as stated earlier, if a proper investigation is done instead of merely paying lip service to the provisions of the rule, the PSC would have discovered that the State Secretary has issued the order without proper authority. The PSC merely was prepared to go along with the State Secretary in saying that it agreed with the order even though it was issued contrary to the provisions of the Constitution. It is a sad day if in such a case the applicant cannot bring these proceedings to quash the order of the PSC simply on the ground that he had not first taken the matter of the validity or the transfer order to be adjudicated by the Court. In any event, the presumption, if any, is rebutted by the fact that there was no valid delegation of power given by the PSC to the State Secretary for the attempted transfer of the applicant from one department of Government to another as required by the Constitution.

Then it was also submitted that *certiorari* by its nature is a discretionary remedy. I ought not to exercise my discretion to grant because if granted, the order of the PSC would be quashed and the applicant would remain a public officer and it would therefore amount to and have the same effect of an order of reinstatement. The learned Counsel cited a passage from the case cited by the learned Counsel for the applicant i.e. *Ferguson v. Kinnoull (Earl of)* [1842] 9 Cl & F 251 at 279 suggesting that the remedy for the applicant lies only in damages. The passage states:

> Where a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained.

With all respect, I think the learned Counsel has missed the point again. We are here not dealing with matter of neglect, refusal, or failure on the part of the PSC to perform its duty which it is bound to perform thereby causing injury to the applicant. Here, the applicant is questioning the action of the PSC dismissing him on account of an unlawful order issued by a "usurper", as the learned Counsel for the applicant puts it, which caused a detriment to him resulting in the loss of his job in the Government. He wants that decision of the PSC based on the unlawful order of the State Secretary quashed which is a separate issue from damages which action he may pursue elsewhere.

In support of his contention that the Court by granting the remedy of *certiorari* would in effect be making an order for reinstatement Mr. Fong for the Government also cited the case of *Francis v. Municipal Councillors of Kuala Lumpur* [1962] 28 MLJ 407. That case concerns an application for a declaration and not one for an order of *certiorari*. It was held that where there had been a purported termination of a contract of service a declaration that the contract still subsisted would rarely be made and would not be made in the absence of special circumstances, because of the principle that the Courts would not grant specific performance

of contract of service. But here the applicant is not seeking for a declaration from this Court or for specific performance. He seeks to quash the decision made by the PSC upon him by way of *certiorari* for want of jurisdiction. Hence, the case is not at all relevant. Declaration declares right of a plaintiff but in *certiorari* proceedings the Court does not declare the right of the applicant. If the Court finds that the applicant in a *certiorari* proceeding has made out his case all that the Court does is to quash the decision. By so doing the Court does not grant any consequential relief to the applicant as the Court would do in a declaration matter. Quashing a decision may have the consequence of reinstatement. However no authority is cited that this indirect consequence is a ground for refusal to grant application for *certiorari. Certiorari* concerns with the supervisory jurisdiction over inferior Courts or tribunals. In further support of the contention that the remedy of *certiorari* ought not to be granted to the applicant, another case was cited. It is the case of *Chief Constable of North Wales v. Evans* [1982] 3 All ER 141 where a probationary constable, who was found to have been wrongly dismissed, was only granted the declaratory relief. In that case Evan sought relief under RSC O. 53 of England, for an order of *certiorari* to quash the chief constable's decision that he should resign or be discharged an order of *mandamus* requiring the chief constable to reinstate him to the office of police constable, and a **declaration** that the chief constable's decision requiring him to resign or be discharged was illegal *ultra vires* and void. The House of Lord granted only the declaratory order sought and refused the *certiorari* and *mandamus* relief. In my view, that case can easily be distinguished because in England as different from the position in Malaysia, an application for a declaration is an application by way of judicial review under RSC O. 53. Hence the three remedies sought by Evans in the case. In Malaysia, O. 53 RHC does not include an application for a declaration for purpose of judicial review. An application for declaration here in this country is proceeded with normally by way of writ of summons and does not require leave to commence as is required of orders under 0. 53 of the RHC and our RHC does not prohibit a litigant to have separate actions under O. 53 as well as writ action for a declaratory order. It is also submitted by Counsel that since the applicant has his pending action for damages in Suit No. KG. 126 of 1989 and in Suit No. KG. 31 of 1993 he should be left to pursue that remedy instead of granting him the remedy by *certiorari*. For the reason stated, I see no merit to this submission. If he succeeds in this application, the decision of the PSC must be quashed pursuant to O. 53 of the RHC. In any event the fact that the applicant has filed the two suits is not relevant to the application for the order of *certiorari*. This Court sitting to hear application for *certiorari* has no reason to be concerned with the applicant's pending actions against those who wronged him. As stated earlier, in proceedings under O. 53 of the RHC this Court can grant only the order of *certiorari* and not consequential reliefs such as damages or declaration, in contrast to the English RSC O. 53 which allows the applicant for *certiorari* to claim also other reliefs such injunction and declaration. It is, therefore, open to the applicant to pursue other consequential remedies in other actions. Again it is said that as the applicant's service with the Government has been interrupted for some years now since the dismissal, by allowing him to be back into the service, there would be an obvious danger that an undercurrent of ill-feeling would affect his future relations with those in the Government whom on record he has taken action against. That is not the concern of the Court in granting *certiorari* remedy should the applicant succeed as otherwise no order at all should be made in the circumstances as so submitted by Counsel.

In the circumstances, I am satisfied that the PSC has no jurisdiction to institute the disciplinary proceeding against the applicant resulting in his dismissal based on the purported order of transfer of the State Secretary which was issued without lawful authority. Such being my decision, it is no longer necessary for me to consider the other grounds put forward by

the applicant in support of this application as whatever proceedings of the PSC that follow arose of the *ultra vires* act of the PSC in commencing the proceedings without jurisdiction. I accordingly order that the decision made by the PSC on 14 December 1988 whereby it was ordered that the applicant be dismissed from the State service as an accounting officer with effect from 1 January 1989 be quashed. The costs of and occasioned by this application of the applicant be borne by the PSC to the credit of the applicant to be taxed unless agreed.